IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.131 OF 1991

Anant @ Daji Gauru Hardas,
aged about 40, Occ. Business
residing at Shriram Maruti
Mills, Shriram Maruti Road,
Kalyan, Dist : Thane ... **Appellant**
(Original Deft.No.4)

Versus

1. **Madhukar Gauru Hardas**
   aged about 45 years,
   Occ : Business, residing
   at Lahiri Building, Station
   Road, Kalyan, Dist : Thane

2. **Smt. Laxmibai Gauru Hardas**
   aged about 72 years,
   Occ. household, residing at
   Dudh Naka, Kalyan, Dist : Thane

3. **Shri Ramchandra Gauru Hardas**
   aged about 62 years,
   Occ. Business, residing at
   Hardaswadi, Kalyan, Dist : Thane

4. **Shri Dwarkanath Gauru Hardas,**
   aged about 43 years,
   Occ. Service, R/o. Shastri Nagar,
   Akansha Building, Dombivali,
   Dist : Thane.

5. **Harishchandra Gauru Hardas,**
   Occupation : Service,
   residing at Dudha Naka,
   Kalyan, Dist : Thane. ... **Respondents**
   (No.1 Orig. Plaintiff Nos. 2 to 5, Orig. Defts.1,2,3 & 5)

Mr. V.S. Gokhale for Mr. B.P. Apte Advocate for Appellant

Mr. K.Y. Mandlik, with Mr. L.M. Nerlekar, Advocate for Respondent No.1.

CORAM : S.R.SATHE,J.

DATED : 25/08/2006

ORAL JUDGEMENT :-

1. The Appellant, original defendant No.4 in Regular Civil Suit No.381 of 1976 has preferred this appeal against the judgement and order passed by the Court of 7th Additional District Judge, Thane in Civil Appeal No.210 of 1983 whereby the appeal was allowed and the judgement and order passed by the learned Trial Judge dismissing the Plaintiff's claim for declaration was set aside and declaration as prayed by the Plaintiff was granted. For the sake of convenience hereafter the parties shall be referred to as *'Plaintiff'* and *'Defendants'*.

2. The brief facts giving rise to this appeal are as under :-

The original Plaintiff Madhukar G. Hardas and defendant Nos. 2 to 5 are sons of deceased Gauru Mukund Hardas. The original Defendant No.1 is the wife of late Gauru Mukund Hardas. Late Gauru had several self acquired properties. He executed a will dated 17/10/1957. However,subsequently on 19/08/1975 he executed another will by cancelling the earlier will. It is a registered will.

3. According to Plaintiff, late Gauru was the owner of the property bearing Municipal house No.2 situated in lane (आळी) No.2 at Kalyan and was running rice mill in the said property. Late Gauru was running the said rice mill and defendant No.2 used to help him for the same. However, from the year 1970, the defendant No.4 Anant @ Daji started helping late Gauru in rice mill business. Till the time Gauru died, the license of the said rice mill was in his name.

4. According to Plaintiff, by virtue of Registered Will dated 19/08/1975, the Plaintiff as well as Defendant Nos. 1 to 5 i.e. legal heirs of Late Gauru were given right in the said rice mill. Gauru had an intention to sale this rice mill during his life time. However, it was specifically mentioned in the will that if the said rice mill is not disposed of during the life time of Gauru then it be sold after his death and out of the said consideration, the Government dues, other loans, Income tax, Sales Tax be paid and balance amount be divided equally amongst the Plaintiff and defendant Nos. 1 to 5. It was further specifically mentioned in the said will that if any of the above mentioned legal heirs desires to purchase the rice mill

then he is entitled to purchase it for a price which would be 15% less than the market price and then in that event, after paying the dues, the balance amount is to be distributed amongst the heirs.

5. It is the Plaintiff's case that 15 days after the death of Gauru, several meetings took place between Plaintiff and defendants with regard to management of rice mill and the open space in front of the same. However, the defendant No.4 refused to follow the instructions in the will and implement the same as per the conditions mentioned in the will. On the contrary, he started claiming that, the rice mill is owned by him and he alone has right to run the same. Not only that but he also told the Plaintiff and others that he would make changes in the rice mill and will also install some other machinery for carrying on other business of *kurmure* and *Pohe*. Thus, when Plaintiff found that denying the directions in the will, the defendant No.4 alone was trying to obtain possession of the entire rice mill, the Plaintiff filed suit No.387 of 1976 and prayed for declaration that as per the will executed by Gauru, Plaintiff and defendants have got right to dispose of the rice mill and machinery therein. The

Plaintiff also prayed for permanent injunction restraining the defendant No.4 from creating any obstruction in managing the rice mill as per the Will.

6. The defendant Nos. 1 to 3 and 5 filed their joint Written Statement and submitted that it is necessary to dispose of the property of deceased Gauru as per the will and the defendant No.4 is deliberately refusing the directions mentioned in the will. They also contended that Plaintiff and the said defendants are ready to purchase the mill jointly and to act as per the directions in the Will.

7. The defendant No.4 filed his Written Statement at Exh-42 and contended that there was in fact no cause of action for the Plaintiff to file the present suit and the same is misconceived. According to him, Plaintiff ought to have filed a suit for partition and declaration and mere suit for injunction was not maintainable. He also contended that considering the value of the property in question, the Court of Civil Judge, Junior Division had no jurisdiction to try the said suit.

8. The defendant admitted that Late Gauru has executed a Will in question. He, however, contended that during the life time of Gauru the entire rice mill was being managed by him. Not only that but all claims filed by the different persons with regard to rice mill were satisfied by him. He is fully conversant with the rice mill business and the defendant No.2 has in fact instigated Plaintiff to file the present suit.

9. The defendant also denied the Plaintiff's allegations that after the death of Gauru, there are meetings between the parties for a disposal of rice mill. According to him, even during the life time of Gauru, he had started *Chane-kurumure* business in the said mill since the year 1972 and for that he had obtained the license from the concerned authority with the consent of Gauru. Thus, he contended that as he was running the said rice mill he should be given preference in carrying out the said business. He also contended that he has obtained necessary license for *Chane-kurumure* business as well as other business and purchased machinery for the same and the Plaintiff and defendant Nos. 1 to 3 and 5 be directed to pay compensation for the expenses incurred by defendant

No.4 for running the rice mill. He also contended that the Plaintiff and other defendants have recovered rent of the property owned by Late Gauru and they should give accounts of the same. Lastly, he contended that the suit is not properly valued and proper Court Fee Stamp is not paid. Hence on all these grounds, the defendant No.4 prayed for the dismissal of the suit.

10. On the above mentioned pleadings, the learned Trial Judge framed issues at Exh-71. In order to prove the suit claim, the Plaintiff examined himself at Exh-65 and witness Ramji Prajapati (Exh-78), Ramakant Mishra (Exh-80), Dasharath Suryarao (Exh-81), Dr. Haripal Tanwani (Exh-86), Ramakant Bhosale (Exh-93) PW-8 Laxmibai Hardas i.e. original defendant No.2 (Exh-113). As against this, the defendant No.4 examined himself at Exh-122. Both the parties produced several documents.

11. After considering the evidence adduced by both the parties the learned Trial Judge came to the conclusion that will in question is duly proved and in fact admitted by both the parties. He however held that in view of the provisions of section 34 of the Specific Relief Act, 1963, Plaintiff ought to have filed a suit

for partition and as he has not done so, plaintiff is not entitled to claim only declaration. He, therefore, rejected the Plaintiffs prayer regarding declaration. The learned Trial Judge, however, held that defendant No.4 is trying to sale the rice mill as his exclusive property and if he is allowed to do so, the Plaintiff and other defendants would suffer as they are also having right in the rice mill. The learned Trial Judge, therefore, issued permanent injunction against defendant No.4 restraining him from disposing the suit property or creating any incumbrance on the same.

12. As the Plaintiff's claim with regard to declaration that Plaintiff and defendants are having a right to dispose of the rice mill and its machinery, building etc. as per the Will of Late Gauru was rejected, plaintiff filed First Appeal No.210 of 1983. After hearing the learned Advocate on both the sides, the learned 7th Additional District Judge came to the conclusion that Plaintiff was entitled for declaration as prayed. He, therefore, set aside the order passed by the learned Trial Judge dismissing the Plaintiff's case for declaration and allowed the Appeal and granted relief of declaration as prayed by the Plaintiff.

13. Being aggrieved by the above mentioned order of declaration, the original defendant No.4 has filed the present Second Appeal.

14. While admitting the appeal this Court *(Coram : A.A. Desai, J.)* passed the following order :-

> *"Admit- on ground No. 1.*
>
> *The said ground is as under.:-*
>
> *Whether the lower Courts properly interpreted the provisions of section 34 of the Specific Relief Act ?"*

15. In this Appeal before me, the learned Advocate for the Appellant has urged only two points. *Firstly,* he submitted that the learned First Appellate Court has not properly considered the provision of section 34 of the Specific Relief Act. According to him, when admittedly there were several properties owned by Gauru and the will dated 19/08/1975 is in respect of the property of Gauru, it was necessary for the Plaintiff to file a suit for partition and as such the learned Trial Judge committed an error in passing decree for declaration. He, therefore, submitted that the appeal

be allowed and the decree for declaration be set aside. As against this, Shri Mandalik learned Advocate for the Plaintiff supported the Judgement and order passed by the learned First Appellate Judge.

16. The learned Advocate for the Appellant argued before me that the plaintiff's suit, merely for declaration in respect of rice mill is not maintainable as no consequential relief with regard to the sale or partition of the rice mill is sought by the plaintiff. In fact the learned trial Judge relying on the provisions of Section 34 of the Specific Relief Act 1963 has held that the plaintiff ought to have filed suit for partition. He, therefor did not pass decree for declaration as sought. However, the learned first Appellate Court noticed that under the circumstances of the case the declaration sought by the plaintiff was correct and he had also sought consequential relief of injunction. He therefore allowed the appeal.

17. In order to find out as to whether the order passed by the learned first appellate court is legal and correct it would be worthwhile to see what Section 34 of the Specific Reliefs Act 1963 says. It runs as follows :-

> *Discretion of Courts as to declaration of status or right -*
>
> *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :*
>
> *Provided that no court shall make any such declaration where the Plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.*

18. From perusal of the above Section it is very

clear that to maintain a suit under this Section the following essential ingredients must be established.

> ***(1)*** *That the Plaintiff is a person entitled to any legal character or to any right as to property ;*
>
> ***(2)*** *That the defendant is a person, denying or interested to deny the Plaintiff's title to such character or right ;*
>
> ***(3)*** *the declaration sued for is a declaration that the Plaintiff is entitled to a legal character or to a right to property ; and*
>
> ***(4)*** *Where the Plaintiff is able to seek further relief than a mere declaration of title, he must seek such relief.*

19. Proviso to Section 34 of the Specific Reliefs Act, 1963 lays down that no court shall make any such declaration where the plaintiff being able to seek further relief than mere declaration of title fails to do so. The object of this proviso is to avoid multiplicity of suits where the plaintiff is entitled to some consequential relief directly flowing from the

right or title of which he seeks declaration, he must seek such relief along with declaration.

20. It is an admitted fact that late Gauru executed a Will dated 19-8-1975 in respect of his self acquired properties amongst which there is one property commonly known as rice mill property i.e. the suit property. It is very clear that even the defendant no.4 has also admitted the execution of the will. It is not disputed in any manner. However, it is only contended by defendant No.4 that so far as rice mill is concerned, he was managing the same for several years and even during the life of late Gauru he has made some investments therein. It is very clear that it is only in respect of this property the dispute has arisen between the plaintiff, defendant nos.1 to 3 and 5 one one side and defendant no.4 on the other side. As specific direction was given in the Will as to how action should be taken regarding rice mill after the death of Gauru, it became necessary for the plaintiff to take such action. However, as defendant no.4 created hindrance in taking steps with regard to rice mill the plaintiff sought the declaration that the plaintiff and defendants have got right to dispose of the rice mill

as per directions given in will of late Gauru. Not only that but we find that by way of consequential relief plaintiff also sought permanent injunction restraining the defendant No.4 from creating any obstruction in taking steps or disposing of rice mill accordingly as per directions given in the Will.

21. It can not be said that this is a case where it was necessary for the Plaintiff to file specific suit for partition of rice mill. Having regard to the facts and circumstances of the case as well as facts on record and considering the position of law, I have no hesitation to hold that learned First Appellate Judge was right in grating declaration. There is no error of law in the order passed by the learned First Appellate Judge.

In this view of the matter there is no substance in this appeal.

The appeal is dismissed with costs.

(S.R.SATHE,J)

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